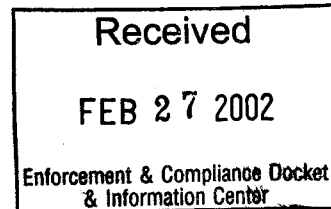


EC-2000-007
IV-D-090



KANSAS
DEPARTMENT OF HEALTH & ENVIRONMENT
BILL GRAVES, GOVERNOR
Clyde D. Graeber, Secretary

March 1, 2002



United States Environmental Protection Agency
Enforcement and Compliance Docket and Information Center
(Mail Code 2201A)
Attn: Docket Number EC-2000-007
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Sir or Madam:

The Kansas Department of Health and Environment, KDHE, appreciates the opportunity to comment on the proposed rule for electronic submittal of discharge monitoring report data. The use of electronic data reporting is a cost effective method of providing monitoring data in a fast, convenient, accurate and user- friendly format.

Briefly summarizing KDHE's main comments:

1. Overall, KDHE finds that the basic requirements set by the proposed rule to assure that any data reported to a regulatory agency are legally enforceable are adequately addressed in the proposed rule.
2. KDHE also finds that the proposed rule sets up specific requirements dictating detailed and prescriptive actions the permittee and the receiving agency must complete to achieve compliance with the basic requirements of the proposed rule. Because of the long-standing and enduring relationships developed between KDHE and its permittees, most of the specific requirements are not necessary and serve only to dampen the sense of trust already established between the parties.
3. Although the rule claims to be technology neutral, EPA has inadvertently incorporated many technology specific details into the proposed rule by making certain assumptions concerning types of programs likely to be used, accepting or denying use of certain communication mediums, and

requiring certain procedures which are based upon an underlying technology.

4. As a result of having made certain assumptions, EPA has chosen to incorporate burdensome procedures and specific requirements into the proposed rule. These requirements are so burdensome and onerous that many regulatory agencies will not offer an electronic reporting option to their permittees. Furthermore, many permittees will decline to use electronic reporting if offered under the conditions proposed by the rule. For regulatory agencies not dependent upon PCS, monitoring data submitted on paper will not likely be transferred to electronic form by the agency and therefore, will be available only as paper copies from a physical file.
5. Throughout the detailed comments, which follow, KDHE will be requesting EPA to substantially revise the proposed rule to include only the basic requirements to assure that data submitted electronically is legally enforceable and to remove all specific requirements and references to specific technologies which discourage the use of electronic reporting of discharge monitoring report data.

If you have any questions concerning the information contained herein, please contact Ed Dillingham at edilling@kdhe.state.ks.us or 785.296.5513.

Sincerely yours,

SIGNED

Karl Mueldener, PE, Director
Bureau of Water

Attachment A

ATTACHMENT A

DETAILED COMMENTS ON THE ELECTRONIC REPORTING RULE

1. EPA, in formulating the proposed rule, has assumed that no agencies are currently receiving any of the documents to be regulated by the proposed rule in an electronic format. That assumption is incorrect. There are many agencies which have proceeded on their own to develop programs to receive such data electronically. These agencies can not now go back to paper submittals while EPA is determining whether or not their programs comply with the requirements outlined in this proposed rule. EPA must add language to the proposed rule to allow these agencies to continue to receive data electronically while EPA is reviewing these agencies' programs and provide opportunity for the agencies to adapt their on-going programs to meet the requirements of the final rule.
2. EPA states repeatedly that the rule is technology neutral. However,
 - A. Many of the specific requirements adopt specifications which are characteristics of only certain technologies, for example PKI.
 - B. With the extensive discussion of CDX in the proposed rules, this agency is concerned that CDX has become the "defacto" standard by which any other system will be judged.
 - C. By excluding certain types of media communications (particularly disks), the proposed rule is **not** between use of data from a properly secured disk received in the U.S. Mail than receiving a hard copy of the data in the U.S. Mail. Any media communications system that meets the basic requirements of the rule for proper protection of the data should be allowed.
 - D. In discussing various "robust" restrictions on access to the system, it is obvious that EPA has already chosen as its basic requirement, a system in which the access procedure is similar to what is used with PCS in which each party reporting data to PCS has its own access code. Such a system assumes that all permittees will "dial-in" (similar to PCS ADE) or download a preset format for that facility, complete it off-line and then "dial-in"

This agency requests EPA remove the detailed sections on PKI and CDX from this proposed rule so as not to inadvertently impose them as the defacto standard and also to revise other areas of the proposed rule to assure the rule is truly technology neutral.

3. This agency is aware of concerted effort the Department of Justice has made to stop the submittal of discharge monitoring report data by electronic means because of fears they will be unable to prosecute cases if there is no written signed document. The proposed

rule amply reflects their fears with the pages and pages of one- time and on- going requirements to obtain approval to use electronic submittals. Although this agency agrees that data must be properly protected from the time it is entered until it arrives at the agency, and the agency must be able to verify and reproduce the data in a manner acceptable to a court, the draconian efforts the proposed rule uses to achieve this goal are overly prescriptive and unnecessary. Most agencies have a working relationship with their facilities based upon respect and trust. In fact, the entire NPDES self- monitoring/self- reporting system is based upon the trust and integrity of the permittee. The proposed rule replaces this basic principle with a never- ending set of

very small minority of permittees who really are seeking to deceive the agency by falsely reporting data. However, despite the zealous efforts to catch this very small minority, the rule does nothing, and can do nothing, with the easiest method of deception - sample tampering. The permittee wishing to deceive the agency can do so by tampering with the sample since the sample, and thus the evidence, will have been discarded long before the report is submitted to the agency. No amount of effort on the part of EPA or any other environmental agency to propose rules, no matter how draconian, will stop the dishonest permittee from reporting false data as long as the basis of the NPDES program is self-monitoring/self-reporting. This agency requests EPA revise the portion of the rules concerning requirements for who may use electronic reporting to make them user friendly for the 99+ % of the honest permittees rather than making this 99+% go through draconian measures so EPA can attempt to catch the less than 1% of the dishonest permittees.

4. The proposed rules request comments on the effect this rule will have on small business and communities. In its current form, the effect is likely to be small since, because of the extensive requirements and the far-reaching effects of participation, the state agencies are discouraged from offering the program to small businesses/communities and these entities are discouraged from participating in the program. For small businesses/communities, participation in the current NPDES paper-based program means one piece of paper, an envelope and stamp on a monthly, quarterly, semi- annual or annual basis. There is no financial incentive for either the state agencies to allow participation, or the small businesses/communities to participate in the electronic submittal of DMR data. As a result, such data is likely to continue to be submitted on paper forms. Unless the state agencies enter such data in electronic form using their own manpower and financial resources, the data will not likely be readily available in either a state data base or the EPA PCS. This will be unfortunate since most of this data is already, or can be easily put in an electronic format at the permittee's level. Currently, these data are reproduced in hard copy for submittal to the state agency. Therefore, this agency requests that EPA revise the proposed rules to make them user friendly for both the agencies and the permittees to encourage, rather than discourage, electronic submittal of data.
5. Record keeping: It is obvious that the technology does not yet exist to meet all the requirements currently being proposed for Record keeping, particularly reproduction of digital signatures. EPA needs to acknowledge this fact and remove those portions of the

Record keeping requirements for which the technology does not yet exist.

6. The proposed rule provides adequate criteria to assure the data provided through electronic means has full legal standing. This is a proper function of the proposed rule. However, the proposed rule then goes into extensive and detailed requirements on **how** this is to be accomplished. These **how to** requirements are overbearing and for the most part unnecessary. They will discourage many entities which would normally participate in electronic submittal of data to decline to participate. Furthermore, because of the extensive requirements, many states will not request or allow permittees to participate in electronic submittal of data because it is more work than just accepting the data on paper. This agency requests EPA substantially revise the proposed rule and limit it to the criteria needed for a "legally enforceable" electronic submittal and leave the details of "how to" to the states to work out as is needed to ensure enforceability based upon state program criteria and procedures.

7. In column three on page 46171, the proposed rule states:

"EPA does not intend to imply that information or documents derived from electronic transactions that were not in compliance with all applicable requirements and agreements, could not be introduced as evidence at trials, would not constitute admissions, or would not constitute records required by, or used for compliance with, applicable statutes."

It is obvious that EPA does not intend to require each and every reporting criteria to be met for the data to be legally enforceable. Therefore, the many requirements in this proposed rule that go beyond the basic criteria are not required to assure that the data is legally enforceable. This agency again requests that the "requirements" be pared down to a minimum. This will encourage greater participation in electronic submittals by the states and their permittees.

8. Many of the basic requirements to properly protect passwords, secure data once entered, detect when data has been altered (especially after certification) and during transmission are appropriate requirements to insure that the data are legally enforceable. However, many of the specific requirements to assure that these basic requirements are met go well beyond what is needed. In some cases, the detailed requirements place these rules at

- A. Page 46173. Most big businesses require that an upper management person review and authorize compliance data to be transmitted to the permitting authority. They do not enter the data into the program nor do they actually physically certify the data. These duties are assigned to lower level personnel who have a more thorough understanding of data entry program, submittal requirements and procedures, the day-to-day operations of the laboratory or the wastewater treatment facility and are therefore, more knowledgeable concerning when the discharge monitoring data reflects the operation of the facility.

However, this rule will require that the upper management person personally certify the data and can not downward delegate this authority even when the lower level personnel are better qualified to certify the data. Alternatively, the business can release the upper management person of this responsibility and designate a lower level person to certify the data. However, numerous cases on environmental law do not allow upper management to delegate responsibility for environmental concerns solely to lower level management.

- B. The rest of proposed registration agreement and renewal statement are unnecessary and damaging to the currently established relationship between the permittee and the regulating agency. Such pre-established relationships are not voluntary as state and federal law do not allow either party - the regulator or the permittee - to voluntarily quit such relationships. Therefore, these relationships are long-standing and enduring. In addition to thrusting non-standard business practices by edict upon the cities and businesses wishing to use electronic submittals, these specific requirements are so prescriptive as to be easily perceived as being antagonistic toward the permittees in a program dependent entirely upon self-monitoring/self-reporting. This agency has a very good working relationship with its permittees. Introducing procedures which damage this relationship will discourage this agency and its permittees from adoption of this electronic reporting program.
- C. If the basic requirements for gathering representative samples, using certified laboratories (permit requirements), and properly entering data and protecting such data (basic requirements of this rule) are adhered to, there is no need for the registration agreements and renewal statements proposed in this rule.

This agency requests EPA remove the requirements for the registration agreements and renewal statements or, at least, substantially revise them to reflect the on-going

- 9. Page 46174. EPA requested comment on a proposal to require a signature holder who no longer retains that position to sign an additional certificate, the requirements of which are identical in nature to the original registration/renewal statements.

This agency knows of no way it would be able to force a former signature holder / possibly former employee of a permittee to sign such a statement. Also, any such person would be unwise to sign such a document after they had left the position, thus leaving themselves liable for any discrepancies found in the data during their tenure.

- 10. Page 46174. This rule proposes that the electronic document receiving system have a mechanism to automatically revoke an electronic signature whenever certain conditions are detected.

This proposal is patterned after the EPA PCS system which allows only so many unsuccessful attempts to log on until it locks the user out and requires the user to call the

EPA Regional Office to be "reset". There is no need for an automatic revocation of an electronic signature. If all the basic requirements have been followed concerning submittal of data, there should be so few problems with receiving the data that any discrepancies noted as a result of receiving the data can be handled on an individual basis by direct agency-to-permittee communications. If a problem still exists, the agency can then cancel the current electronic signature, re-issue another one and require re-submittal of any questionable documents.

Automatic revocation of signatures is not needed and the requirement should be removed from the proposed rule.

11. Page 46175 Electronic Signature/Certification Scenario

The basic premises concerning electronic signature and certification of the submittal are that the electronic signature is a legally enforceable signature, that the party signing the submittal intends to submit that submittal to fulfill a regulatory requirement and that the contents of the submittal are truthful and accurate. These are basic requirements that are

The remaining requirements are designed to force the person signing the submittals to review all the data, acknowledge certain warnings, sign more certifications concerning his conduct associated with the data, etc. This agency knows of no way it can force someone to review all the data, read warnings, etc. Any system should make the information available in a readily readable form to the party signing the submittal so they have the **opportunity** to review the data and read the warnings. Whether or not the party signing the document chooses to review the data in detail is beyond the control of the regulatory agency. The only certification which should be required is the one set up in Federal law, 40 CFR Part 122.22 which covers the basic requirements to assure that the submittal is legally enforceable.

This agency requests EPA revise the electronic signature and certification section to reflect the on- going relationship of the regulatory agencies and their permittees and comply with current federal law concerning certification of data submitted to regulatory agencies.

12. Page 46176. The proposed rule would require the electronic document receiving system to **automatically** acknowledge receipt of a submittal, to send such acknowledgment to an "address" "chain of custody" and to return a copy of the submittal to the submitting party.

According to the initial statements supporting this rule, the intent was to be sure an electronic submittal was legally equivalent to a paper copy. None of these proposed specific requirements are requirements when submitting the data by paper copy. If the paper submittals are legally enforceable without these requirements, this agency questions why an electronic submittal without these requirements would not be legally enforceable.

This agency requests that these requirements be removed from the proposed rule as they serve no useful purpose except to add additional work for the receiving agency and the permittees.

13. Although this rule's primary purpose is to establish the criteria for accepting discharge monitoring report data via electronic means, over half of the rule is dedicated to two purposes - exact identification of who actually certifies the data (as compared to whose responsibility it is) and assurance that there is no possible way to repudiate the data after submission. Unfortunately, the specific requirements proposed in this rule are so prescriptive and onerous that it is far more likely that a permittee could be prosecuted for violating the specific requirements than the main criteria used to assure legal enforceability of the submitted data. This agency requests that EPA revise the specific requirements to emphasize the importance of providing true and correct data that represents the effluent quality and less on procedural aspects designed to create self-incrimination of the signature holder.

END OF COMMENTS